IN THE

Supreme Court of the United States

1968 TERM

No. 1272

RAYMOND SHEAFFER, ET AL., *Petitioner*

v.

WAREHOUSE EMPLOYEES UNION, LOCAL 730, ETC., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

1968 TERM

No. ..... MISCELLANEOUS

RAYMOND SHEAFFER, ET AL., *Petitioner*

v.

WAREHOUSE EMPLOYEES UNION,
LOCAL 730, ETC., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals is unreported as of this time. A copy is attached to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1969. The jurisdiction of this Court rests on 28 U.S.C., 12541(1).

QUESTION PRESENTED

Did not the action of the trial judge, affirmed by the Court of Appeals, deny the petitioner due process of law and involve an extension and misconstruction of this Court's decision in *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 87 S. Ct. 1386, when the Court dismissed for want of prosecution under Rule 41(b) of the Rules of Federal Civil Procedure, a case which had been completely pre-tried and was 24 hours away from trial on the merits at the time the order was signed?

STATUTES OR RULES INVOLVED

Rule 41(b) of the Rules of Federal Civil Procedure Local Rule 13(a) of the United States District Court for the District of Columbia Fifth Amendment to the Constitution

STATEMENT OF THE CASE

Petitioner filed a complaint against the respondent seeking compensatory and punitive damages under § 303 of the Taft-Hartley Act and under the common law of the District of Columbia for malicious interference with contractual relations and personal property. An answer was filed to the complaint; ultimately all discovery procedures were completed; the case was pre-tried; and a trial date was set in the Assignment Office for January 9, 1968. The respondent appealed to the United States District Court from the action of the pre-trial commissioner, who overruled his Motion to Dismiss for Want of Prosecution, the respondent contending in his motion that a Certificate of Readiness, which was filed by the petitioner pursuant to Local Rule 13(a) of the United States District Court for the District of Columbia, was filed on November 6, 1967 instead of November 1, 1967. (See Certificate of Readiness filed Nov. 6, 1967) The matter came on for

hearing before the District Court on January 5, 1968, four days before the case was to be tried on its merits, (Tr. 1-25 Jan. 23, 1968) The trial judge granted the Motion to Dismiss, commenting on the long delays that take place in the trial of cases. Petitioner filed a Motion to Vacate on January 8, 1968, setting forth the entire history of the case. An affidavit of an official in the Assignment Office in support of the motion established that the January 9, 1968 trial date was the first trial date ever assigned to the case. (Affidavit filed Jan. 8, 1968) The trial judge overruled the Motion to Vacate and proceeded to review the entire history of the case, to support the action taken by him in dismissing the case for want of prosecution 24 hours before its trial on the merits. Opinion of Trial Ct. (App. 1a-7a). Appeal was timely filed to the United States Court of Appeals, which affirmed the opinion of the trial judge on January 23, 1969. (App. 8a-11a)

SUMMARY OF ARGUMENT

This case involves the denial of due process to the petitioner and a flagrant violation of Rule 41(b) of the Rules of Federal Civil Procedure and a misconstruction of this Court's decision in *Link* v. *Wabash R.R. Co., supra,* wherein this cause was dismissed for want of prosecution 24 hours before it was to be tried on the merits.

This appeal involves the application of Local Rule 13(a), which requires a litigant to file a form called a Certificate of Readiness. The form which was filed five days late on November 6, 1967 and which gave rise to this proceeding has, we suggest, resulted in a severe miscarriage of justice to the petitioner. The record in this case discloses further that the action of

the trial judge and the Court of Appeals is wholly unsupported under *Link* v. *Wabash R.R. Co.* since there was no prejudice to the respondent in this case because of the fact that the respondent filed no list of witnesses pursuant to the pre-trial order and was thus precluded from calling witnesses at trial. Thus the only adverse effect on the memory of witnesses referred to by the trial judge would be to the petitioner in the presentation of his case.

ARGUMENT

The petitioner was denied due process of law by the action of the trial judge in dismissing his case for want of prosecution 24 hours before it was to be tried on the merits in Court.

The Court of Appeals has affirmed the action of the District Court, holding it was not an abuse of discretion when the trial judge, as stated above, dismissed the case for want of prosecution 24 hours before it was to be tried on the merits. The trial judge filed an extensive opinion in denying the Motion to Vacate his action (App. 1a-7a), in which he sought to set out the entire history of the case showing past dilatory acts by the petitioner without seeking to establish the equally dilatory acts by the respondent in the orderly pretrial preparation of this case.

Be that as it may, and however Courts throughout the country and in the District of Columbia may be uneasy about the delays that result in the processing of justice, the invocation of this Local Rule 13(a) by the District judge overruling the pre-trial commissioner who had recommended the case go forward to trial, is not the way either to dispense justice or clear the Court docket. The right of a litigant to have his case

tried on the merits is a basic one and should be abrogated by no one under local or technical rules, such as was involved in this case where the defect which gave rise to the proceeding which ultimately ended in the dismissal of this case, was the tardiness of the petitioner by some five days in filing his Certificate of Readiness.

We suggest to the Court that the trial judge recognized the indefensible position of his initial action in dismissing the case for want of prosecution, and in the opinion denying the Motion to Vacate, (App. 1a-7a) he proceeded to look at the entire history of the case in order to support his action. While we feel this was not proper, even a search of the entire history of the case did not support the action taken by the trial judge when the case was 24 hours away from trial on the merits.

The Court of Appeals in affirming the case and in holding the trial judge did not abuse his discretion, stated that the trial judge had a right to review the entire record of the proceeding, even though procedurally the only matter that was before the trial judge was what punishment, if any, should be inflicted on the litigant for the five-day tardy filing of his Certificate of Readiness. Assuming the correctness of this ruling of law by the Court of Appeals, the fact of the matter is that a search of the entire record shows as many dilatory acts by the respondent as by the petitioner and the opinion fails wholly to take into consideration that since the respondent had filed no list of witnesses under the pre-trial order, the major prejudice that incurred from delay in bringing the case to trial was suffered by the petitioner.

Other actions outlined (App. 1a-4a) of the opinion relating to the fact that the petitioner did not file his case until August, 1962 when the tort occurred in 1961, is wholly irrelevant since a plaintiff has the right anytime within the period of the statute of limitations to file his action; and in this case an ascertainment of the damages could not be readily obtained.

In *Link* v. *Wabash R.R. Co.,* over the dissents of the Chief Justice and Justice Douglas and Black, this Court went as far as any prior decision of this Court in affirming a dismissal of an action for failure of his counsel to abide by Court rules. In that case there was actually a failure of the trial counsel to show up at a pre-trial conference. There is no similarity between the case and the present one. Here all of the procedures had been completed; the pre-trial commissioner had recommended that the matter go to trial; and the assignment commissioner had set a trial date of January 9, 1969.

The Court of Appeals speaks in its opinion about the delays in getting cases to trial, and certainly there are delays, some of which may be attributed to counsel, some of which may be attributed to the Court, and some of which may just inhere in the process of administering justice itself. Whatever may be the sensitivity of Courts in the District of Columbia elsewhere or everywhere to the fact that long delays are necessitated before cases are tried on the merits, the invocation of local rules, in this case Local Rule 13(a), to dismiss a case 24 hours before it is to be tried on the merits, may clear the docket of a case but it does justice to no one—neither the petitioner, the respondent, nor the Court. We think the language of Mr.

Justice Black, dissenting in *Link* v. *Wabash R.R. Co.,* has direct application to this factual situation:

> "It is true that by its ruling today the Court finally puts an end to this case, and thus clears it from all federal dockets; but in view of the fact that the merits of the case have never been reached, I cannot believe that there should be too much rejoicing at this fact. The end result of the procedures adopted here has been that much time has been wasted and yet no justice has been done."

The trial judge committed an abuse of discretion in dismissing the case initially and a further abuse of discretion in failing to set aside the dismissal when petitoner had moved pursuant to Rule 60(b) of the Rules of Federal Civil Procedure. See *Gill* v. *Stolow,* 240 F. 2d 669; *Becker* v. *Safelite Glass Corp.,* 244 Fed. Sup. 625 (1965); *United States* v. *Myers,* 38 FRD 194; *Sandee Mfg. Co.* v. *Rohm and Haas Co.,* 298 F. 2d 41; *Leong* v. *Railroad Transfer Service, Inc.,* 302 F. 2d (555) (1962); and *Rankin* v. *Shayne Bros., Inc.,* 280 F. 2d 55.

The petitioner was denied due process of law and has been denied his day in Court when that day was 24 hours away. There was an abuse of discretion, a misconstruction of this Court's ruling in *Link* v. *Wabash R.R. Co.,* and this Court should grant the Writ of Certiorari.

CONCLUSION

This case presents a very serious issue to this Court. It involves the petitioner being denied his day in Court, 24 hours before it was to be heard on its merits and where the Court of Appeals has allowed the action to stand, holding that it did not constitute an abuse of

discretion. It has cleared a case from the docket in time where Court delay is a subject of much discussion. Whatever may be the injustice of delays in litigation, the action taken here on the facts of this case is wholly unwarranted and denied petitioner due process of law.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 1963-63

RAYMOND SHEAFFER, ET AL., *Plaintiffs*

v.

WAREHOUSE EMPLOYEES UNION, LOCAL 730, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Defendant*

Order

On January 8, 1968, this Court dismissed this suit for want of prosecution by the plaintiffs.

Plaintiffs now ask that the Order of January 8, 1968, be vacated.

The question here is whether or not the plaintiffs have shown reasonable diligence in the prosecution of this suit.

A review of the chronology of this suit shows the following:

The acts of the defendant of which the plaintiffs complain are alleged to have occurred from July 23, 1961 to August 25, 1961.

The plaintiffs' complaint was filed August 1, 1963, 2 years from the period during which the alleged commission of the acts complained of occurred. The applicable Statute of Limitations permitted the plaintiffs 3 years within which to file their action, but once the action was filed, it became the plaintiffs' duty to prosecute the action with reasonable diligence and to obey all orders and rules of this Court in relation thereto.

Service of the complaint was had on the defendant on August 19, 1963.

On September 27, 1963, defendant filed a Motion to Strike Paragraph XVIII of the complaint. On October 4, 1963, at plaintiffs' request, the time to Answer the motion to strike was extended from October 5, 1963 to October 21, 1963. On October 21, 1963, plaintiffs filed their opposition to defendant's motion to strike. On November 8, 1963, the motion to strike was denied.

On November 27, 1963, plaintiffs filed an Amended Complaint under FRCP 15(a).

The defendant filed an Answer to the Amended Complaint on January 14, 1964. The record does not disclose the reason or excuse for the late filing of the Answer to the Amended Complaint. If it was by stipulation, then no written stipulation was filed as required by Local Civil Rule 3.

On January 14, 1964, the cause was calendared pursuant to Local Civil Rule 11(b). With the calendaring of the cause, it became the duty of the plaintiffs to expeditiously undertake such discovery as might be called for and then to file and serve a Certificate of Readiness as provided in Local Civil Rule 11(d). To this date, the file indicates no discovery by plaintiffs and it is, therefore, to be assumed that no discovery was required. This being so, it was the duty of the plaintiffs, in order to reasonably expedite the trial of this matter, to file a Certificate of Readiness within a reasonable time after January 14, 1964, unless there was good and valid reason for not doing so, and no such reason appears in the file.

The case was assigned for Calendar Call on October 6, 1964. This lacked but a few days of being 10 months from the time the case was Calendared and during which time the plaintiffs filed no motions, undertook no discovery and filed no Certificate of Readiness. On October 2, 1964, counsel for defendant wrote to counsel for the plaintiffs and

advised that defendant's counsel had talked to the Pre-Trial Office and that it would not be necessary for either counsel to appear at the Calendar Call on October 6, 1964. Defendant's counsel further advised plaintiffs that the case would be called on that date and "your 6 months (Local Civil Rule 13(a)) would run from that date."

The case was called on the Calendar on October 6, 1964, and, due to an error in the Pre-Trial Office, the case was dismissed for want of prosecution because of failure of plaintiffs to respond to the Call. When this mistake was called to the attention of Miss Elizabeth Bunten, Assistant Pre-Trial Examiner, she prepared an Order vacating the dismissal of October 6, 1964, and this Order was signed by Judge Keech on October 19, 1964.

The effect of the Order of Judge Keech of October 19, 1964, was not only to set aside the dismissal of October 6, 1964, but to start the 6-month period for filing a Certificate of Readiness under Local Civil Rule 13(a) running from October 19, 1964, or until April 19, 1964. During this period plaintiffs again took no action to file a Certificate of Readiness or to in any other manner take steps looking toward the trial of the issues framed in the Amended Complaint and Answer. The plaintiffs simply permitted the case to remain dormant while the claim grew staler and staler and the memories of witnesses grew dimmer and dimmer.

On April 23, 1965, the Clerk of this Court entered a notation of dismissal of this action under Local Rule 13 for failure to prosecute as of April 19, 1965, the end of the 6-month period from Judge Keech's Order of reinstatement. The Clerk notified the parties of the dismissal as required by the Rule.

The foregoing action by the Clerk stirred the plaintiffs out of their lethargy, but only slightly. On April 28, 1965, the plaintiffs filed a motion to reinstate the action pursuant to Rule 13. The only excuse or reason given by plaintiffs

for reinstating the action dismissed pursuant to Rule 13 was "Plaintiff has proceeded on the understanding that defendant would arrange for re-scheduling of a pre-trial conference at the convenience of the defendant." This alleged reason is a *non sequitur* since a pre-trial conference would have no effect on the running of the 6-month period under Local Civil Rule 13. The reason would further suggest that plaintiffs had surrendered the management of their case on the Calendar to defendant's counsel.

On May 5, 1965, defendant filed Points and Authorities and Affidavit in Opposition to plaintiffs' motion to reinstate the action dismissed pursuant to Rule 13. The motion at this time became ripe for hearing, notwithstanding which fact the plaintiffs allowed the matter to remain in limbo until January 7, 1966, when it was finally presented to the Pre-Trial Examiner.

On January 7, 1966, the Pre-Trial Examiner, after hearing no motion to reinstate the action, granted the same and marked the case "Called" as of this date. The effect of this Order was to start Rule 13 running again, from January 7, 1966.

Again the plaintiffs dawdled and finally, on June 20, 1966, shortly before the end of the reinstated Rule 13—6-month period, plaintiffs' counsel filed a Certificate of Readiness.

The next action in this matter was some 8 months later when on February 21, 1967, the matter came on for Pre-Trial hearing before Miss Elizabeth Bunten, Assistant Pre-Trial Examiner.

In the Pre-Trial Order of February 21, 1967, which was signed by counsel for both Plaintiffs and Defendant and a copy of which was given to each counsel, the following Order to counsel for the plaintiffs and Stipulation between counsel were included:

Page 4: (Pre-Trial Order)

> "NOTE: The Examiner directed counsel for plaintiffs to furnish her for attachment to this Order, copy to counsel for defendant, the computation of compensatory damages claimed on or before 3/15/67."

At Page 6: (Pre-Trial Order)

> "Counsel agree to exchange the names and addresses of all witnesses known to them, including experts but exclusive of impeachment witnesses, on or before March 22, 1967, filing a copy of said list with the Clerk of the Court, and if either counsel should thereafter learn of any additional witnesses prior to trial, he will inform opposing counsel promptly and prior to trial, filing a supplemental witness list with the Clerk."

The plaintiffs ignored the Order of the Pre-Trial Examiner to furnish the computation of compensatory damages by March 15, 1967, and ignored the Stipulation to furnish the names and addresses of witnesses on or before March 22, 1967.

The case was put on the Daily Assignment on April 3, 1967, at which time the case could not have been tried due to the failure of plaintiffs to comply with the Pre-Trial Order and Stipulation.

On April 7, 1967, the plaintiff having failed to obey the Order and Stipulation of the Pre-Trial Order, as set forth above, the defendant filed a motion to dismiss or in the alternative to strike from the calendar this cause of action. Service on plaintiffs' counsel was by mail. Since service of the motion was by mail, the plaintiffs had 8 days from April 7, 1967, to file Points and Authorities in opposition to the Motion. Plaintiffs filed no Points and Authorities in opposition to the Motion within the 8-day period or at any other time.

On April 27, 1967, a month and 12 days after the Pre-Trial Examiner had ordered the same filed, the plaintiffs did file in the cause their statement of compensatory damages. On the same date, plaintiffs filed their list of witnesses which was a month and 5 days after they had stipulated that they would file them.

On April 21, 1967, the defendant's motion to dismiss or strike from the trial calendar came on for hearing before Judge Jones and Judge Jones granted the motion to strike from the Ready Calendar. So, we find that due

to the failure of the plaintiffs to prosecute their suit with reasonable diligence, this case is stricken from the Ready Calendar 5 years and 8 months after the alleged events giving rise to the cause of action and 3 years and 8 months after the action was filed. During all of this time the claims are growing staler and staler and the memories of witnesses dimmer and dimmer.

On May 1, 1967, pursuant to his ruling of April 21, 1967, Judge Jones signed an Order formally striking the matter from the Ready Calendar and noting in his Order that no opposition had been filed by the plaintiffs to the Motion to Strike.

On November 6, 1967, over 4 years after the filing of this suit, Albert J. Ahern, Jr., Esquire, entered his appearance as co-counsel for the plaintiffs. Since that time this case has been handled in a diligent manner on plaintiffs' behalf in sharp contrast to the lethargic progression and retrogression of this case from January 14, 1964 to November 6, 1967. The activities of plaintiffs' new co-counsel, while admiral in their vigor, come too late to breathe life into this moribund case.

On November 6, 1967, Mr. Ahern filed a Certificate of Readiness in this matter. By the time this last Certificate of Readiness was filed, this case had been pending for more than 4 years with no action being taken by the plaintiffs nor their counsel to reasonably expedite the trial of this case in any way. On November 16, 1967, defendant filed an Opposition to the Certificate of Readiness and moved to dismiss the action for failure to prosecute. Plaintiffs filed a Reply to Opposition to Certificate of Readiness and Motion to Dismiss for Failure to Prosecute on November 29, 1967. This matter was heard by the Assistant Pre-Trial Examiner on December 8, 1967, who recommended that the Opposition to the Certificate of Readiness be overruled and further recommended that defendant's Motion to Dismiss for Want of Prosecution be denied.

On December 12, 1967, defendant filed Objections to the Examiner's recommendations and asked that the cause be dismissed under Rule 13. These objections were replied to by plaintiffs on December 20, 1967. Defendant's Objections came on for hearing before this Court on January 5, 1968, and, after examining the file and hearing arguments of counsel, the Court dismissed the cause for want of prosecution.

The entire history of this case, from the calendaring of the cause on January 14, 1964, to the entry of Mr. Ahern as co-counsel for the plaintiffs on November 6, 1967, is a classic example of foot-dragging, indifference and sleeping on rights by the plaintiffs. At no time during this entire period is it possible to conclude that the plaintiffs showed any reasonable diligence in prosecuting this suit but to the contrary, they showed complete indifference to their obligation to move this case forward to trial with reasonable diligence and they ignored and flouted the Orders of this Court, their own Stipulations and the Rules of this Court.

As a result of the indifference and dilatory tactics during the period indicated by plaintiffs and their counsel, this matter again became ripe for hearing at a time 6½ years after the alleged acts the plaintiffs complained of and 4½ years after the complaint was filed.

Had the same diligence been shown in prosecuting this case after it was calendared on January 14, 1964, as has been shown since November 6, 1967, this case would have been tried and disposed of years ago.

In view of the foregoing, the Court concludes that the dismissal of this action on January 8, 1968, was proper and the Motions to Vacate said Order be and the same hereby is denied.

GEORGE L. HART, JR.
Judge

Date: February 1, 1968

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,687

RAYMOND SHEAFFER, ET AL., *Appellants*

v.

WAREHOUSE EMPLOYEES UNION, LOCAL NO. 730, ETC., *Appellees*

Appeal from the United States District Court
for the District of Columbia

Decided January 23, 1969

Mr. Albert J. Ahern, Jr., with whom *Mr. John K. Pickens* was on the brief, for appellants.

Mr. John J. McBurney, with whom *Mr. James F. Carroll* was on the brief, for appellees.

Before: FAHY, *Senior Circuit Judge*, McGOWAN and TAMM, *Circuit Judges*.

TAMM, *Circuit Judge:* This case comes before us an appeal from an order of the District Court (issued January 8, 1968) (J.A. 75) dismissing appellants' claim for want of prosecution and as an appeal from an order (issued February 1, 1968) (J.A. 89-97) of the District Court denying appellants' motion to vacate, under Fed. R. Civ. P. 60(b), the aforementioned order dismissing appellants' claim. Since we find that the trial judge did not abuse his discretion in dismissing this cause of action, we must affirm the District Court's order.

The merits of this case, which of course are not before us, involve a suit by appellants seeking compensatory and

punitive damages under Section 303 of the Taft-Hartley Act, as amended, 29 U.S.C. § 187 (1964). The acts complained of occurred in the late summer of 1961. The complaint was not filed, however, until August 1, 1963, nearly two years later. A detailed account of all the proceedings in this action from its inception in August, 1963 until its demise in February, 1968 is set out in the District Court's order denying appellants' motion to vacate the court's prior order (J.A. 89-97). We need not reiterate these facts in detail. Upon inspection of all the pleadings we find that this case was handled in an extremely dilatory fashion. The record reflects numerous violations of our local court rules and pre-trial orders, and a complete lack of diligence in bringing the case to trial as evidenced by the continually tardy filing of the appropriate motions and papers. Appellants' lethargy ceased on November 6, 1967, when their present cousel entered the case as co-counsel. We find, however, that after over four years of procrastination his arrival came too late to save appellants' cause of action.

What requires emphasis here is the plain fact that appellants have not complied with the rules of the District Court which were promulgated with a view toward increasing judicial efficiency. Congested court dockets, vexatious to all litigants, are the direct result of lax implementation and enforcement of court rules. Here, appellants assert that their latest violation, of local rule 13(a),[1] is excusable and

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[1] Rule 13(a) of the Rules of the United States District Court for the District of Columbia provides in pertinent part:

(a) *Dismissal Without Prejudice: Notice of Warning.*

> If a party seeking affirmative relief fails for six months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim . . . or take other action looking to the prosecution of his claim, or to file a certificate of readiness under Rule 11(d) within six months of the date the action is called on the call of the civil calendar, the complaint shall stand dismissed without prejudice . . .

that strict enforcement of such constitutes "judicial nit-picking in an attempt to justify an improper order" (Brief for Appellants at 19-20). We do not agree; rather, we feel that local rule 13(a) has legal efficacy and should be enforced. The history of this litigation provides no good reason for an exception to the enforcement of court rules.[2]

It is clear that the District Court has the "inherent power" to dismiss a case for want of prosecution. *Link* v. *Wabash R.R. Co.*, 370 U.S. 626 (1962); *Slavitt* v. *Meader*, 107 U.S. App. D.C. 396, 278 F.2d 276 (1960); *Dyotherm Corp.* v. *Turbo Machine Co.*, 392 F.2d 146 (3d Cir. 1968); *Kenney* v. *California Tanker Co.*, 381 F.2d 775 (3d Cir. 1967), *cert. denied*, 390 U.S. 904 (1968). This power exists independent of the authority of the Federal Rules of Civil Procedure (Rule 41(b)) or any local rules of court (rule 13(a), *supra* note 1).

It is of utmost importance to note that this power exists only in the District Court, not here on appeal. Our function is to determine whether the District Court "abused its discretion" in dismissing this case. *Barger* v. *Baltimore & Ohio R.R.*, 75 U.S. App. D.C. 367, 130 F.2d

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[2] Appellants' counsel stresses the fact that he was "24 hours away from having . . . (the case) tried . . ." when the trial judge dismissed it (Brief for Appellants at 21). Actually, the case was set for trial on January 9, 1968. In the oral argument before Judge Hart on January 5, 1968, appellants' counsel never mentioned the specific trial date; rather, he stated only that "it's ready for trial" (J.A. 17), with no further elaboration. Counsel did, however, specifically state the trial date in the order he submitted to the trial judge on January 8, 1968. The trial judge did not sign appellants' counsel's order and instead signed the order submitted by the appellee's counsel. We feel that in view of the entire record in this case, which reflects extreme lethargy, the trial judge did not abuse his discretion in dismissing for want of prosecution, notwithstanding the impending January 9th trial date.

401 (1942); *Shotkin* v. *Westinghouse Electric & Mfg. Co.*, 169 F.2d 825 (10th Cir. 1948); *Taub* v. *Hale*, 355 F.2d 201 (2d Cir.), *cert. denied*, 384 U.S. 1007 (1966); *Pearson* v. *Dennison*, 353 F.2d 24 (9th Cir. 1965). We feel that no abuse of discretion occurred here in view of the long history of procedural ineptness and delay on the part of appellants.

Two other contentions of appellants merit discussion. Appellants' counsel argues forcefully, within the framework of a vitriolic personal attack upon the trial judge, that this case was dismissed on January 8, 1968, on the basis of "matter[s] . . . not before him . . ." (Brief for Appellants at 15). In addition, appellants argue that the decision of the trial court was a "gross departure from comity and the law of the case . . .". (Brief for Appellants at 24). We feel that under the relevant authority it is clear that the trial judge is entitled to inspect the entire procedural history of the case before deciding whether to dismiss it for want of prosecution. *Sandee Manufacturing Co.* v. *Rohm & Haas Co.*, 298 F.2d 41 (7th Cir. 1962); *Deep South Oil Co. of Texas* v. *Metropolitan Life Insurance Co.*, 310 F.2d 933 (2d Cir. 1962). Each case, of course, must be evaluated within its own procedural context. With this in mind, a dismissal based upon the record in appellants' case simply cannot be considered an abuse of discretion.

Contrary to appellants' assertion, the action of the trial judge, based upon the particular history of the case, is well supported. *Slavitt* v. *Meader, supra; Darlington* v. *Studebaker-Packard Corp.*, 261 F.2d 903 (7th Cir. 1959), *cert. denied* 359 U.S. 992; *Shotkin* v. *Westinghouse Electric & Mfg. Co., supra; Gorsuch* v. *Provident Security Life Insurance Co.*, 392 F.2d 200 (9th Cir. 1968); *Garden Homes, Inc.* v. *Mason*, 249 F.2d 71 (1st Cir. 1957), *cert. denied* 356 U.S. 903 (1958); *Sweeney* v. *Anderson*, 129 F.2d 756 (10th Cir. 1942); *United States* v. *Chas. Kurz Co.*, 396 F.2d 1013 (C.C.P.A. 1968); 5 J. Moore, Federal Practice § 41.11(2) (2d ed. 1967); Fed. R. Civ. P. 41(b).

We find therefore that, upon inspection of the entire record, the trial judge did not abuse his discretion in dismissing appellants' cause of action for want of prosecution. The order of the District Court is therefore

Affirmed.

FAHY, *Senior Circuit Judge:* I concur in affirmance. On the whole record I do not think the District Judge abused his discretion in dismissing the case for want of prosecution.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1272

RAYMOND SHEAFFER, ET AL., *Petitioner*

v.

WAREHOUSE EMPLOYEES UNION, LOCAL 730, ETC., *Respondent*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1969. However, the jurisdiction as alleged by Petitioner is not correct and is not within the scope of Rule 19 of this Court.

QUESTIONS PRESENTED

1. Was the action of the District Court Judge, affirmed by the Court of Appeals, in dismissing Petitioner's suit for failure to prosecute, an abuse of discretion in view of the Petitioner's repeated disregard of and failure to comply with the Orders and Rules of the United States District Court?

RULES INVOLVED

Local Civil Rules 11(a), 11(d) and 13(a). Rule 41(b) of Rules of Federal Civil Procedure.

STATEMENT OF THE CASE

This action arose out of a labor dispute between Petitioner, sometimes referred to as the Company, or Sheaffer, and Appellee, Local 730, sometimes referred to as the Union.

The Petitioner filed a suit on August 1, 1963 for compensatory and punitive damages, under Section 303 of the Taft-Hartley Act and the common law of the District of Columbia, alleging malicious interference with contractual relations and personal property. An Amended complaint was filed on November 27, 1963 concerning the alleged incidents of July and August of 1961. On January 14, 1964, the cause was calendared.

The case was dismissed on October 6, 1964, for failure to prosecute, but reinstated on October 19, 1964, because the dismissal was occasioned by mutual mistake of the parties.

On April 19, 1965, the suit was again dismissed for failure to prosecute, the Petitioner having failed to

comply with Local District Court Rules, Nos. 11(d) and 13(a).

On April 28, 1965, the Petitioner filed a Motion to Reinstate its suit. This was opposed by the Appellee. The matter did not come to hearing until January 7, 1966 because Petitioner failed to file a Motions Card. On this date the suit was reinstated by the Pre-Trial Examiner and the six month period of Rule 13(a) commenced to run. Appellee did not object to this re-instatement.

The Petitioner filed a Certificate of Readiness on June 20, 1966, and eight months later, on February 21, 1967, a pre-trial hearing was held and an Order issued.

Under this Order, Petitioner was to supply Appellee a computation of compensatory damages by March 15, 1967 and a list of witnesses by March 22, 1967.

Appellee, on April 7, 1967 filed a Motion to Dismiss together with a Motions Card or in the alternative strike from the calendar as the Petitioner had failed to abide by the Order of the Pre-Trial Examiner. Petitioner was mailed a copy of this Motion. Petitioner filed no opposition to Appellees' Motion, and in fact did not appear before Judge Jones to present opposing argument at the hearing held on April 21, 1967. On that date, Judge Jones ruled that the case be struck from Ready Calendar.

It was not until April 27, 1967, six days after the Court's ruling that Petitioner furnished Appellee with the information required by the Pre-Trial Order of February 21, 1967, approximately six weeks later than

directed by the Order. This information should have been furnished by March 15 and March 22, 1967, respectively.

On May 1, 1967, Judge Jones signed an Order, based upon his ruling of April 21, 1967, and the six month Rule of 13(a) again commenced to run.

More than six months after Judge Jones signed his Order of May 1, 1967, specifically on November 6, 1967, Appellee was served with a Certificate of Readiness, and a notice of appearance that another attorney was now associated in the case for Petitioner.

Appellee on November 16, 1967, filed an Opposition to the Certificate of Readiness and a Motion to Dismiss for Failure to Prosecute, asserting among other arguments that Petitioner had once again failed to comply with the Rules of the Court and that the suit was automatically dismissed.

The Appellee's opposition was referred to the Pre-Trial Examiner and she denied Appellee's Motion on December 8, 1967, and recommended that the case be reinstated.

On December 12, 1967, Appellee filed Objections to the Examiner's Recommendation of December 8, 1967, and asked that the cause be dismissed under Local Rule 13. The Motions Court, in its Order of January 5, 1968, granted Appellee's Motion. Petitioner subsequently filed a Motion to Vacate which was denied. That denial was appealed to the United States Court of Appeals which affirmed the Order of the trial judge on January 23, 1969.

ARGUMENT

This matter deals with the Interpretation placed upon Rules of the United States District Court for the District of Columbia and whether such interpretation constituted an abuse of discretion by the trial judge. The pertinent Rules and parts of said Rules read as follows:

RULE 13

DISMISSAL FOR FAILURE TO PROSECUTE

(Revised June 27, 1961)

(a) DISMISSAL WITHOUT PREJUDICE: NOTICE OF: WARNING.

"If a party seeking affirmative relief fails for six months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim, or to avail of a right arising through the default or failure of an adverse party, or take other action looking to the prosecution of his claim, *or to file a certificate of readiness under Rule 11(d) within six months of the date the action is called on the call of the civil calendar, the complaint,* counterclaim, crossclaim, or third-party complaint of said party, as the case may be, *shall stand dismissed without prejudice,* whereupon the Clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear, of which mailing he shall make an entry. *One month prior to the termination of the six month period the Clerk shall warn the dilatory party by mail that his claim will stand dismissed if he fails to comply with this rule,* making an entry in the docket of the mailing. (Revised June 27, 1961)."

(b) "FAILURE TO WARN: EFFECT. A failure of the Clerk to give the warning as above provided

will not affect the running of the six months' period or otherwise relieve a party from operation of this rule."

RULE 11

CALENDARING AND ASSIGNMENT OF ACTIONS: CERTIFICATE OF READINESS: CALL OF THE CIVIL CALENDAR: ASSIGNMENT COMMISSIONER, ETC. (Revised June 25, 1958)

(d) "CERTIFICATE OF READINESS. After a civil action is at issue and placed on the general calendar, any party thereto not in default may file and serve a certificate of readiness. Such certificate shall constitute a representation that all discovery has been completed and that the case is actually ready for trial. Within ten days thereafter any other party to the action may file objections to the certificate of readiness. If no objections are filed within ten days, the action shall be placed on the Ready Calendar. If objections are filed within said period, the party objecting shall at the same time provide and deliver to the Clerk a motions card calendaring same. In the event no motions card is provided at the time objections are tendered for filing, the Clerk shall refuse to accept the objections for filing. If the motions Court overrules the objections, the action shall be placed on the Ready Calendar. If the Motions Court sustains the objections, the action shall not be placed on the Ready Calendar, but in that event another certificate of readiness may be filed by any party at a later date, and such certificate shall be subject to the same procedure. (Revised April 4, 1962)"

Appellee acknowledged that its Motion to Dismiss for failure to prosecute, denied by the Pre-Trial Examiner on December 8, 1967, was in fact granted on January 5, 1968, just before the matter was to go to

trial. However, this fact in and of itself does not constitute an abuse of discretion on the part of the trial Judge. Since there must be a passage of time between the filing of Objections (12/12/67) and a hearing on said Objections to the Pre Trial Denial, the time and instance of the granting or denying of a motion and its relationship to a trial date is of little importance. When Appellee filed its Motion to Dismiss on November 16, 1967, no trial date had been set. Nor was it set on December 12, 1967 when Appellee filed Objections to the Pre-Trial Denial of its November 16, 1967 Motion.

Appellee respectfully points out to this Court the numerous occasions upon which Petitioner could have, if not should have, filed a Certificate of Readiness. That the Petitioner permitted its case to be dismissed for failure to prosecute is obvious from the record. The filing of a Certificate of Readiness on November 6, 1967, does not vitiate its failure to proceed as required by the rules.

Local Rule 13 of the U.S. District Court for the District of Columbia requires a Plaintiff to file a Certificate of Readiness under Rule 11(d) within six months of the date the action is called . . . .", for the case shall stand dismissed without prejudice." Since the latest of a series of failures to proceed must be measured from May 1, 1967, we discover from the record that no certificate was filed until November 6, 1967, a point in time six days later than the time limitations permitted by Rule 13. Since the Petitioner stood automatically dismissed under the immediately above referred to rule, procedurally it should have filed a Motion to Reinstate. This it did not do

and while the record reflected that the Pre-Trial Examiner disagreed with the argument presented by the Appellee herein, the District Court Judge in his order of January 8, 1968 recognized the apparent willful, if not negligent, failure of Petitioner to proceed.

It is respectfully suggested there are numerous dismissals for failure to prosecute. The failure to comply with the Pre-Trial Order of February 21, 1967, not only warrants the dismissal of this cause for failure to prosecute but in fact borders upon contemptuous attitude of the Court itself. The fact that since November 6, 1967, a new attorney has become associated with the case and has actively filed numerous documents, motions and appeals, does not now cure the failure of the Petitioner to have proceeded with due diligence. Appellee respectfully points out to the Court that the cases cited by Petitioner all recognize the right of the Trial Court to dismiss the cause for want of prosecution and also recognize that under Rule 60(b) of the Federal Rules of Civil Procedure that the relief permitted under this Rule is basically equitable in nature.

The power of a Court to dismiss a cause of action for want of prosecution is inherent and the exercise of this inherent power is not per se an abuse of discretion. (See *Link* v. *Wabash R. Co.*, 370 U.S. 626.) The trial judge and the Court of Appeals applied that decision herein.

It is submitted by Appellee that to reverse the action of the District Court Judge and the Court of Appeals would be to make a nullity of the rules which the District Court has adopted for its orderly operation. Either the rules are to be observed or the constant and

repeated failure to abide by said rules would cause chaos and delay in the orderly administration of justice.

Criticism has been directed to the administration of justice because of the large backlog of cases on the docket in many Courts and rules have been adopted by the Court in order to expedite cases before it. That this case was not expedited must rest solely upon the shoulders of Petitioner. The recent activity engendered by new counsel does not in any way correct its previous failure to prosecute. The Order of the District Judge, and its affirmation by the Court of Appeals, dismissing for failure to prosecute does not constitute an abuse of his discretion, *Barger* v. *B&ORR,* 75 U.S. App. D.C. 367, *Taub* v. *Hale,* 355 F. 2d 2010, cert. denied 384 U.S. 1007 (1966), nor does it constitute a misconstruction or extension of *Link* v. *Wabash R.R. Co.,* 370 U.S. 626, 87 S. Ct. 1386.

CONCLUSION

WHEREFORE, in the light of the above, this Court should dismiss the Petition for Writ of Certiorari.

Respectfully submitted,

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